

Perspective patronale en droit de l'emploi et relations de travail
Labour and Employment Law for Employers

Emond  Harnden LLP

“Stressed Out”

Accommodating Employees
with Mental Health Problems

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The Accommodation Problem

- Mental health problems seem to be on the rise, posing an increasing burden on employees, employers and co-workers
- Employers understand they have business and legal reasons to accommodate employees with mental health problems
- But don't know how to accomplish that
- Or when they've done enough in the effort to accommodate

What is a “mental health problem”?

- It is *not* a lack of character, intelligence or will power
- Typically characterized by changes in ability to concentrate, make decisions, deal with problems, behave rationally, control impulse, accurately assess situations, often with changes in physical health (sleep, diet, energy) etc
- Usually a “whole life” impact – not isolated to work
- Depressive, “mood” or bi-polar disorders
- Anxiety disorders (includes “stress”)
- Substance-related disorders
- Schizophrenia / psychotic conditions
- Personality disorders (i.e. paranoia)
- Abuse-related disorders

Common Accommodation Misconceptions and Errors with MHPs

- Accepting total disability as the only outcome
- Unrealistic recovery expectations
- Co-worker or manager insensitivity, inappropriate comments constituting harassment
- Accepting questionable medical information as the basis for a prolonged absence due to MHP / not seeking a second or specialist opinion
- A lack of knowledge leading to hasty judgments about the validity of the condition
- Treating MHP like standard physical injury cases, not dealing with the unique aspects
- Failure to implement positive “support” accommodations
- Impatience, leading to sudden changes of direction and/or termination of the employee

Equal Treatment

“Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status or disability”

Ontario Human Rights Code s.5(1)

Disability

“Disability” means...

(b) A condition of mental impairment or a developmental disability;

(c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language;

(d) a mental disorder...”

Ontario Human Rights Code, s.10(1)

It is legal to discriminate...

“A right of a person under this Act is not infringed for the reason that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability.”

Ontario Human Rights Code, s.17(1)

But only after trying to accommodate

“The Commission, the Tribunal or a court shall not find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.”

Ontario Human Rights Code, s. 17(2)

The Purpose of Accommodation

- To enable a person to participate, perform and produce at an acceptable level in the workplace
- To contribute to the person's recovery from illness or injury
- To build an inclusive, respectful workplace
- To retain the past investment in the employee
- To fulfill the legal duty to accommodate under the Ontario *Human Rights Code* or *Canadian Human Rights Act*

Objectives of the Accommodation Policy

- If possible, to enable people to participate, perform and produce to an acceptable standard at work

and

- To demonstrate that the employer made a good faith effort, to the point of undue hardship, to achieve that

What is Accommodation?

In the original or an alternative job, change to the:

- Methods of achieving results
- Tasks and duties of a job
- Tools, equipment, clothing, etc.
- The workplace environment
- Supports and resources
- Hours and location of work
- Expected results of the job

To enable the person to participate, perform and produce

Accommodation is a Two-Way Street

- It is a means of enabling someone to work, not a guarantee of employment
- If it doesn't produce real value for the employer, it won't be sustainable for the employee
- The employer's legitimate work-related expectations are a necessary part of the accommodation
- BUT – the employee's need to be accommodated is usually more important than the employer's preferred or established methods of doing work

Standard Accommodation Process -1

- Once the need is presented, or is evident, obtain objective evidence of the need – not just the employee’s assertions
- Avoid diagnostic information – seek restrictions, prognosis, treatment-related limitations
- Test the information provided – ensure you understand it before you try to apply it
- Contain the spread of information outside of the RTW or HR function
- Obtain advice, including your own IME, if necessary to confirm the restrictions

Standard Accommodation Process -2

- Identify and measure the legitimate work-related expectations for the job or set of tasks:
 - who are the internal or external customers of the job?
 - what are the “outputs” of the job?
 - what are the standards for participation, performance and productivity in the job?
- Find or establish the “task bank” for the job, related to those outcomes, dependencies, roles and responsibilities. More than a job description or PDA, it is a picture of how the job fits into the whole scheme of your business or program

Standard Accommodation Process -3

- Objectively determine which, if any, aspect of the job is barred due to the employee's restrictions
- Can that job requirement be dropped, temporarily at least, to enable the person to continue in the job?
- If not, can the method of achieving the results be altered, to meet the individualized needs of the person?
- If the barriers to continuing in the existing job are too great to overcome, consider re-assignment to alternative work

Undue Hardship

- The necessary changes must be made unless they are an “undue hardship”

Meaning: a risk to someone’s health and safety, or if the cost is beyond the employer’s capacity to bear or borrow

- If the necessary changes amount to hiring someone else to do much or most of the work, consider whether the job can be converted to more than one part-time job
- If the cost of accommodating exceeds the ultimate value of the work performed by the accommodated employee, that may constitute an undue hardship
- *The real test of undue hardship: how hard did the employer try to accommodate and does the evidence show that the employee probably cannot resume productive work?*

Unique Aspects of Accommodating Employees with MHPs

- The absence of useful functional “restrictions” to limit the duties assigned to the employee
- The absence of a clear prognosis for complete recovery
- The effects of the condition on all aspects of the person’s life can complicate its impact on work
- The apparent totality of the disability, making any kind of accommodation difficult or impossible
- The inexperience or discomfort of managers and co-workers

Unique Aspects of Accommodating Employees with MHPs

- Has the condition manifested itself at work before?
- Can a GP properly diagnose and treat a mental health problem?
- Why, when and how do we ask for a specialist opinion or intervention?
- What are the effects of medication or other therapy on the person?
- How do we establish a relationship of trust and relative open-ness with the person?
- Is there a real, or perceived, risk of the employee's behaviour affecting or endangering others?

Accommodation Techniques for Employees with MHPs

- Remember “restriction” management – removing or altering those aspects of the work or workplace that pose a barrier

BUT

- Explore a “support” focus – adding resources to enable the person to remain at work comfortably, to concentrate, to attend to productive work in a safe environment

Accommodation Techniques for Employees with MHPs

- Without a generic, standardized and consistent accommodation policy and practice, specific techniques for MHP cases may not work either to accommodate or to prove the effort
- Test your current approach to ensure that it satisfies the basic standard elements of acceptable practice
- In all cases, but especially MHP cases, have a long-term Return to Work Plan
- RTW Plan should reflect the possibility that the person may not be able to assume a full, regular load of work for some time to come

Accommodation Techniques for Employees with MHPs

- Are there any objective, specific restrictions which we can obtain to guide the tailoring of the job to the person?
- Other than job duties, what are the aspects of the work environment that are believed to cause problems for the person?
- Are there issues with specific customers, clients, co-workers, supervisors, responsibilities, decision-making that burden the person?
- Can the work environment be temporarily or permanently altered to enable the person to resume productive activity?

Accommodation Techniques for Employees with MHPs

- Changes to hours of work may facilitate visits to treating practitioners, or use of medication
- Flexible breaks, etc may be required for the same purpose
- Work at home options, particularly in the early and hopefully temporary stages, are valuable ways to keep the person involved
- Partial participation: attending meetings, training sessions, group functions even if not performing work on a regular basis
- Part-time work

Accommodation Techniques for Employees with MHPs

- Establish a “mentor” or “coach” to monitor, guide and support the employee during the early phases of RTW; basically, to provide non-judgmental oversight
- Permit – and perhaps require – the employee to take breaks to access personal resources (counsellor, family, friends, etc) for support during the work day
- Provide additional training or recommended assistance for the employee to learn new skills
- Train the direct supervisor to be alert to concerns and sensitive to particular needs
- Providing instructions in new ways, such as in writing to ensure clarity

In Conclusion

- These are the most difficult matters to deal with as an accommodation exercise. You, or your people managing these cases, need to be educated
- Policy and practice must reflect the standard accommodation steps
- Do an “accommodation inventory” of current and new cases, to track your full efforts to accommodate all forms of personal need in the workplace
- In every instance, make an RTW plan that incorporates appropriate individualized practices to promote the inclusion and re-integration of the employee
- Document, document, document